any, "were not tortious as to the plaintiff[]" as a matter of law, and Pappas' claim fails for that reason as well. See id.

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The above discussion demonstrates the illusory nature of plaintiff's tort claims against the Pac-10. We now turn to Pappas' attempt to turn non-existent tort claims into an antitrust case.[7]

C. Plaintiff Cannot Prove Any Of Its Antitrust Claims

1. This Is Not a Per Se Case

Plaintiff alleges that the Pac-10's television agreements with ABC and PTN are per se illegal. That is incorrect; only "naked restraints" on competition may be condemned per se. E.g., White Motor Co. v. United States, 372 U.S. 255, 263 (1963). Before so holding, a court must determine that the challenged practice "would always or almost

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[7] Pappas may argue that summary judgment is inappropriate in an antitrust case. To the contrary, since Matsushita, the Ninth Circuit has repeatedly recognized that summary judgment is appropriate, even in Rule of Reason cases. See, e.g., Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir.) (summary judgment is especially useful to "save the parties and the courts from unnecessarily spending the extraordinary resources required for a full-blown antitrust trial."), cert. denied, 112 S. Ct. 617 (1991); Morgan Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1488-92 (9th Cir. 1991); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.22d 139, 152-53 (9th Cir. 1989); (en banc); Eichman v. Fotomat Corp., 880 F.2d 149, 161-63 (9th Cir. 1989); Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1380 (9th Cir. 1989); Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1175 (9th Cir. 1988); Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 984 (9th Cir. 1988). This is especially true where, as here, a plaintiff has "'placed all [its] eggs in the per se basket.'" Palmer v. Roosevelt Lake Log Owners Ass'n, 551 F. Supp. 486, 495 (E.D. Wash. 1982) (citations omitted). Pappas should not be allowed to put the Pac-10 to the enormous expense of defending an antitrust case it cannot begin to prove. Summary judgment should be granted as to these claims, too.

always tend to restrict competition and decrease output," rather than "'increase economic efficiency and render markets more, rather than less, competitive.'" Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1, 19-20 (1979) ("BMI") (citations omitted). As BMI recognized, "[n]ot all arrangements among . . . competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." Id.

The Pac-10 is engaged in a joint selling arrangement, not a group boycott.[8] It is settled that such arrangements often result in greater efficiency and increase overall competition, and any restraints they impose must be analyzed in light of their procompetitive justifications. National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103 (1984); BMI, 441 U.S. at 23-24; cf.

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[8] Pappas' characterization of the Pac-10 television agreements as a group boycott is the sort of "formalistic line drawing" the Supreme Court has forbidden. See Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977). The group boycott classification "should not be expanded indiscriminately, especially where . . . the economic effects of the restraint are far from clear." Oksanen v. Page Memorial Hosp., 945 F.2d 696, 708 (4th Cir. 1991) (citing Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986)), cert. denied, 112 S. Ct. 973 (1992); see also Northwest Stationers, 472 U.S. at 298 ("mere allegation of a concerted refusal to deal does not suffice [for per se analysis] because not all concerted refusals to deal are predominantly anticompetitive"). Besides, this allegation makes no sense. Group boycotts are aimed at a competitor. U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993) ("Today that designation is principally reserved for cases in which competitors agree with each other not to deal with a supplier or distributor if it continues to serve a competitor whom they seek to injure."). To prove a group boycott, Pappas would have to be a competitor of the Pac-10 or its members. There is no such allegation here, nor could there be.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 295-97 (1984) (joint purchasing arrangement analyzed under Rule of Reason); GTE Sylvania, 433 U.S. at 51 (intrabrand restraints often enhance interbrand competition); Ordover Decl. ¶¶ 9-10.

Analyzing nearly identical agreements between the CFA and the Big Eight conference on the one hand, and ABC, ESPN and Katz Communications on the other, Ass'n of Independent T.V. explained the rationale for Rule of Reason treatment:

> Joint ventures among competitors, including joint selling arrangements, may unleash positive economic forces and thus advance the ends of competition. Collaboration by competitors is not illegal when its purpose and principal effects are to increase production, streamline distribution, and otherwise spur competition.

637 F. Supp. at 1297 (emphasis added) (citing Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)); see also U.S. Healthcare, 986 F.2d at 594 ("We doubt the modern Supreme Court would use the boycott label to describe, or the rubric to condemn, a joint venture among competitors in which participation is allowed to some but not all . . . ."). The FTC obviously agreed, because it did not even consider the possibility that the Pac-10/Big Ten contracts might be per se illegal. Ordover Decl. ¶ 13. The Pac-10's contracts must be

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evaluated under the Rule of Reason, and plaintiff's per se claim fails.[9]

2. Plaintiff Cannot as a Matter of Law Prove a Rule of Reason Violation Because There is No Anticompetitive Effect in the Relevant Market

To prove a Rule of Reason violation, Pappas "must demonstrate three elements: (1) an agreement, conspiracy or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition beyond the impact on the claimant, within a field of commerce in which the claimant is engaged." Austin v. McNamara, 979 F.2d 728, 738-39 (9th Cir. 1992). The third element requires plaintiff to prove that "the challenged

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[9] Plaintiff will undoubtedly rely on NCAA v. Board of Regents, 468 U.S. 85 (1984) and Regents of University of California v. ABC, Inc., 747 F.2d 511 (9th Cir. 1984), to support its per se argument. See Amended Complaint ¶¶ 31-39. Neither case supports that position. First, even though the television agreements at issue in Board of Regents gave the NCAA "'almost total control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public,'" (468 U.S. at 96 (quoting the district court)), the Court held that "it would be inappropriate to apply a per se rule" to that case. Id. at 100. Regents of UC merely reviewed for abuse of discretion the district court's grant of a preliminary injunction, and thus never reached the merits of the challenged CFA television contracts. Moreover, the Court expressly failed to reach the issue of whether a per se or Rule of Reason analysis should apply. 747 F.2d at 516. Finally, the analysis in these cases do not apply here because the NCAA was an absolute monopolist, while the CFA is over three times as big as the Pac-10 and Big Ten combined. Neither of the cases Pappas relies on provides any precedential, nor any persuasive, support for its position. See also Ass'n of Independent TV, 637 F. Supp. at 1295-97 (applying Rule of Reason analysis to the CFA television agreements). Ordover Decl. ¶¶ 9-11.

action has had an actual adverse effect on competition as a whole in the relevant market." Capital Imaging, 1993 WL 196067, *6 (2d Cir. (N.Y.)). "Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors." Id. at *5; MMM Sales, 849 F.2d at 1172 ("The conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged."); see also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 812-13 (9th Cir. 1988) ("'It is the impact on competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort.'") (citation omitted).

Pappas cannot meet its burden under the above tests, because it alleges merely that it was unable to televise live two games on two Saturdays in the Fresno area. Complaint ¶¶ 64-71. Plaintiff's inability to prove harm to overall competition is fatal to its Rule of Reason claim. Austin, 979 F.2d at 738-39.

a. Injury to Pappas Does Not Support an Antitrust Claim

It is black letter law that antitrust protects competition, not competitors. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 353 (1990); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 540 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992). Thus, Pappas' inability to televise the two games in question is irrelevant

to injury to competition, which must go "beyond the impact on the claimant."[10] Austin, 979 F.2d at 739 (emphasis in original) (citation omitted). "Even 'the elimination of a single competitor, standing alone, does not prove anticompetitive effect.'" Id. (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980)) (emphasis in Austin); Bhan, 929 F.2d at 1413 ("The only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition."); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987) ("While appellant clearly pleads injury to itself, its conclusion that competition has been harmed thereby does not follow.").

The Supreme Court has twice this year re-affirmed that injury to the market, not a participant in it, is necessary to show competitive injury. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 1993 WL 211562, *10 (U.S.S.C.) ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured . . . ."); Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 891-92 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.")

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[10] Similarly, Pappas' allegation that broadcasters like itself are prevented from competing for advertising dollars "which reduces the revenues and profits to such broadcasters" (Amended Complaint ¶ 14(c)), is also irrelevant.

(emphasis added). Where plaintiff cannot show market failure, i.e., an adverse effect on price, quality or output in a realistically defined relevant market, summary judgment is appropriate.[11] Capital Imaging, 1993 WL 196067, *12. Plaintiff does not claim, and cannot prove, such an adverse effect here.

b. 56 Hours of Live College Football Proves a Competitive Market

Even assuming Pappas' alleged geographic submarket of KMPH's ADI, any claim that competition for televised college football in that market has been injured is demonstrably

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[11] Pappas' only attempt to show market failure is to define the market based on his alleged injury -- the inability to televise two games between FSU and Pac-10 schools in the Fresno area. Thus, Pappas' alleged markets: "cross-over" games, those between a Pac-10 member and a non-member (product) and KMPH's Area of Dominant Influence ("ADI") (geographic). The only support for Pappas' illogical market definition is the bare allegation that those are the markets in which "competition" was injured. See Pltf's Interrog. Responses at 13-15 (Declaration of Frank M. Hinman ("Hinman Decl.") Ex. B). The Court should ignore such unsupported assertions. Morgan, Strand, 924 F.2d at 1490 ("[Plaintiffs] conclusorily state that the relevant geographic market is Tuscon. We give little weight to such a conclusory assertion."). In reality, those are the alleged markets because that is where Pappas says it was injured. Such market definition is improper as a matter of law. See Austin, 979 F.2d at 738-39; Oksanen, 945 F.2d at 709 ("Although Page Memorial may be where Oksanen prefers to practice, this preference alone does not justify excluding other hospitals and other doctors from the relevant market definition."). Pappas' absurdly narrow market definition is an implicit admission that it cannot hope to prove anticompetitive effect in a legally supportable market.

false.[12] On the two Saturdays in question, Fresno fans had 56 hours of live college football to choose from.[13] Hinman Decl. Ex. A. There were two, three or even four live games shown at almost all times on both of those days. Id. Sixteen live games, including matchups with enormous fan interest between traditional powerhouses -- Notre Dame vs. Michigan and Penn. State vs. USC -- competed for advertising dollars and viewers on those two days. Id.

The huge variety of top quality college football games available to Fresno viewers disposes of any claim that output or quality has been adversely affected by the Pac-10's agreements. See Ordover Decl. ¶ 21. Pappas' argument also flies in the face of recent history. Under the old NCAA

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[12] At a minimum, the relevant product market is televised major college football. See Board of Regents v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1297-1300 (W.D. Okla. 1982), aff'd in relevant part, 707 F.2d 1147 (10th Cir. 1983), aff'd 468 U.S. 85 (1984). The Pac-10 will assume for purposes of this motion that other sporting events, as well as other televised entertainment, do not compete with college football. But in any event, Pappas has offered no support, and there is none, for the proposition that "cross-over" games constitute a relevant product submarket. So-called "cross-over" games include a wide variety of matchups, some of high quality and fan interest, others less so. But there is nothing economically unique about those games, and Pappas cannot show that an advertiser or viewer would not substitute any number of other contests for a "cross-over" game.

Indeed, under Pappas' theory of market definition, it has violated the Sherman Act because its contract with FSU gives it exclusive rights to FSU sporting events in KMPH's ADI. Hinman Decl. Ex. D (last page).

[13] Four more games, totalling fourteen more hours, were shown on a delayed basis on those days. Hinman Decl. Ex. A. These games are also part of the product market, although for purposes of this motion the Pac-10 will assume they are not. In any event, it further puts to rest the notion that Fresno fans were starved for college football.

agreements with the networks, which after 1983 the Pac-10/Big Ten and other agreements replaced, only nine hours of live college football were televised per week in any given area. Board of Regents, 546 F. Supp. at 1296; see also Hansen Decl. ¶ 4. Fresno viewers during the weeks in question could choose from an average of eight live games, or 28 hours of football each week. Moreover, from 1987-88 to the past season, the number of national or regional football games on broadcast television increased from 37 to 67, while the number of games cablecast increased from 54 to 192. Hinman Decl. Ex. C.

Likewise, the availability to advertisers of so many top-quality alternatives destroys Pappas' argument that the Pac-10's contracts result in an increased price for advertising that is passed on to consumers. See Complaint at ¶ 14(a). Any attempt by ABC or PTN to change supracompetitive prices for advertising on Pac-10 home telecasts would simply cause advertisers to switch to other games. See Graphic Products Distribution v. Itek Corp., 717 F.2d 1560, 1569 n.11 (11th Cir. 1983); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) (citing Cowley v. Braden Industries, Inc., 613 F.2d 751, 755 (9th Cir.), cert. denied, 446 U.S. 965 (1980)) (where firm without market power attempts to charge supracompetitive prices, "market retribution will be swift").

c. Competition Was Not Injured Because Pappas Could Not Show One More Football Game

Pappas' argument that competition was injured because it was unable to televise one more college football game on each

of two Saturdays also makes no sense. Apparently, plaintiff's position is that eight games, or 28 hours of college football per day (on average) demonstrates market failure, but nine games, or 31-1/2 hours would characterize a healthy market. That is, to say the least, an unprincipled distinction.

If Pappas' theory of "one more game" were accepted, the courts would be flooded with antitrust lawsuits from every local broadcaster that wanted to show one of its home team's games but could not because of exclusivity provisions in that team's conference's (or the CFA's) television contracts.[14] However, the antitrust laws do not assure that every individual broadcaster gets to show every game, irrespective of healthy competition in the market.[15] See Austin, 979 F.2d at 739; Bhan, 929 F.2d at 1414; Morgan, Strand, 924 F.2d at 1489; McGlinchy, 845 F.2d at 812-13; Rutman, 829 F.2d at 235 ("'The antitrust laws are not designed to guarantee every competitor tenure in the marketplace.'") (citation omitted).

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[14] Pappas' claim is even more tenuous than these hypothetical lawsuits, because, as discussed above at pp. 6-9, a miscommunication, and not the Pac-10's contracts, was the reason Pappas could not show the games it wanted to. As shown at p. 25 below, with proper notice and minor changes in the start times, the games could have been shown live.

[15] The FTC also recognized that the effect on individual broadcasters of the Pac-10 contracts' exclusivity provisions did not merit antitrust scrutiny. It dropped its investigation of the Pac-10/Big Ten, realizing that their television contracts do not have the requisite anticompetitive effect. Ordover Decl. ¶¶ 15 & 23. Similarly, in BMI, the Justice Department had entered into a consent decree with defendants regarding their challenged practice. The Court noted that "the Federal Executive and Judiciary have carefully scrutinized . . . the challenged conduct" and that "the Court of Appeals should not have ignored [that fact] completely in analyzing the practice." 441. U.S. at 18.

Pappas will likely argue that the fact that fans interested in watching, live, the FSU games against WSU and OSU were unable to proves injury to competition. This "disappointed viewer" argument is merely the flipside of Pappas' assertion that competition was injured because Pappas could not televise one more game, and is similarly flawed. Antitrust does not judge market failure by focusing narrowly on one group's interest; it evaluates competition in the market as a whole. E.g., Austin, 979 F.2d at 738-39. There will always be groups of viewers, perhaps even large groups, who are not able to watch the game they want to watch every week. Absent a lack of overall competition, the failure to satisfy those particular desires is not market failure that the antitrust laws seek to prevent.[16] Id.; see also Oksanen, 945 F.2d at 708 (it would "trivialize" the antitrust laws to evaluate an alleged restraint not "based on its impact on competition as a whole within the relevant market," but by an alleged injury to a specific group); Ordover Decl.

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[16] Moreover, the effect on the "disappointed viewer" is minimal in any event. First, the Pac-10's contracts have no effect on that viewer's ability to watch FSU games on a delayed basis. Hansen Decl. ¶ 11. It is quite common for teams with a strong local following to tape delay their telecasts. Livengood Decl. ¶ 2; Baughman Decl. ¶ 2; Hansen Decl. ¶ 8. Second, the Pac-10's contracts have no effect on the telecast of its member schools' away games. Hansen Decl. ¶ 7. For example, when FSU hosted WSU and OSU during the 1992 and 1993 seasons, respectively (Johnson Decl. ¶ 3), KMPH was free to televise the games live any time it wanted. Third, the Pac-10 agreements are written to allow overlap between the ABC and PTN telecasts and those of other broadcasters. Id. As shown below, an approximately one hour change in the kickoff times would have allowed both the WSU and OSU games to be shown live in Fresno. Fourth, FSU only played two away games against Pac-10 opponents during the 1991 season. Johnson Decl. ¶ 3. Thus, at most, the Pac-10 contracts affected only two of FSU's entire season of games available for live telecasting.

¶¶ 24-31. Thus, Pappas cannot bootstrap any alleged effect on FSU fans into overall competitive injury either.

As a matter of law and logic, the antitrust laws do not condemn an agreement that, at most, interferes with the ability of a particular broadcaster to televise, or a certain viewer to watch, an occasional live football game.

d. The Pac-10 Agreements Did Not Cause Pappas' Alleged Injury

Not only did the Pac-10's agreements not injure competition as a matter of law, they did not even cause Pappas' alleged injury. KMPH was unable to televise the games in question live because of miscommunication and the failure to make the necessary arrangements, not because of the Pac-10 contracts, which are designed to provide enough room for games like these to be shown. Hansen Decl. ¶ 4. Had WSU and OSU understood that FSU sought live telecasts, the kickoff times of those games might simply have been moved about an hour each to avoid the exclusivity periods of ABC and PTN. See footnote 3, above. Indeed, Pappas admits as much. Complaint ¶ 67. However, by the time OSU and WSU became aware that KMPH planned a live telecast, it was too late, as tickets had been sold, and there wasn't enough time to notify fans of a change. Livengood Decl. ¶ 4; Baughman Decl. ¶ 3.

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The remainder of Pappas' Sherman Act claims must fall along with its section 1 claim, because claims under section 2 also require a plaintiff to prove competitive injury. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31 (1984)

("Without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . . ."); McGlinchy, 845 F.2d at 811 ("injury to competition . . . is required under both sections 1 and 2 of the Sherman Act"). Thus, in the following sections we discuss in detail only the independent grounds for dismissing those claims.

3. Pappas Cannot Prove Its Monopolization Claim

To prove monopolization, Pappas must show (1) monopoly power; (2) the willful acquisition or maintenance of that power; and (3) causal antitrust injury. MMM Sales, 849 F.2d at 1169. It cannot. First, Pappas cannot prove that the Pac-10 holds monopoly power in any of the markets it alleges. All of Pappas' alleged product markets and submarkets are for televised college football. Pappas cannot claim that the Pac-10 competes in, let alone dominates, that market. The Pac-10 members play football games, they don't televise them. Nor can Pappas prove the second element of this claim, because "[t]he test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restricted competition." MMM Sales, 849 F.2d at 1174. Where plaintiff fails to show competitive injury in a section 1 claim, a section 2 claim based on the same facts fails as well. Id. This claim is both legally and factually deficient as a matter of law.

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4. Pappas Cannot Prove Attempted Monopolization

To prove attempt to monopolize, Pappas must establish four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. McGlinchy, 845 F.2d at 811. Attempted monopolization requires a plaintiff to prove that the defendant possesses some economic power in the relevant market. Spectrum Sports, 113 S. Ct. at 891. Just as Pappas cannot prove the Pac-10 has monopolized a market (television) in which it does not compete, it cannot show an attempt to monopolize that market. See section 3, above. Also, the failure to prove competitive injury disposes of this claim as well. See Austin, 979 F.2d at 739 ("Because there was no indication of an injury to competition, there was no cognizable antitrust injury.").

5. Pappas Cannot Prove Section 2 Conspiracy To Monopolize

Pappas' section 2 conspiracy claim must fall along with the section 1 claim, because if Pappas cannot prove a conspiracy to restrain trade, it cannot show a conspiracy to monopolize. Williams v. I.B. Fischer Nevada, 93 Daily Journal D.A.R. 9323, 9324 (9th Cir. 1993) (copy attached as Exhibit A) (citing Thomsen v. Western Elec. Co., 680 F.2d 1263, 1267 (9th Cir.) ("a § 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a § 2 claim"), cert. denied, 459 U.S. 991 (1982)).

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6. Pappas Cannot Prove Its Cartwright Act Claim

The elements of a Cartwright Act claim are "[t]he formation and operation of a conspiracy; illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts." G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 265 (1983). The Cartwright Act is patterned after the Sherman Act, and cases interpreting the latter are applicable to the former. McGlinchy, 845 F.2d at 811 n.4. "The federal and California antitrust laws, having identical objectives, are harmonious with each other." Pardee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 382 (1983), cert. denied, 46 U.S. 904 (1984). Thus, the Sherman Act cases discussed above also apply to defeat plaintiff's Cartwright Act claim. See McGlinchy, 845 F.2d at 811 n.4 (where federal and state antitrust claims rest on the same facts, "our conclusion [affirming summary judgment] with regard to the Sherman Act claims applies with equal force to appellants' Cartwright Act claims").[17]

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[17] In addition, Cartwright Act cases independently require Pappas to prove anticompetitive effect. The Cartwright Act requires "serious harmful competitive impact." G.H.I.I., 147 Cal. App. 3d at 270; see also Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 723 (1982) (Cartwright Act is designed to protect the public "from a restraint of trade or monopolistic practice which has an anticompetitive effect on the market") (emphasis added). Thus, Pappas' Cartwright Act claim falls along with its Sherman Act claims, because it cannot as a matter of law prove anticompetitive effect.

III. CONCLUSION

As the above discussion shows, Pappas can prove no injury caused by the Pac-10, much less one cognizable under the antitrust laws. Its improper antitrust claims, as well as the illusory tort claims from which they arose, should be dismissed.

Dated: August 13, 1993.

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN & ENERSEN

By _____
John N. Hauser
Attorneys for Defendant
The Pacific-10 Conference

EXHIBIT A

ANTITRUST LAW

Corporate Entities Comprising Common Enterprise Are Incapable of Conspiring To Restrain Trade Under Sherman Act

Cite as 93 Daily Journal D.A.R. 9323

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DON WILLIAMS, aka Donald Williams,
Plaintiff-Appellant,
v.
I.B. FISCHER NEVADA; I.B. FISCHER PROPERTIES, INC.; IRA FISCHBEIN; FOODMAKER, INC.,
Defendants-Appellees.

No. 92-15463
D.C. No. CV-90-00464-RDF(R)
OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Submitted July 14, 1993*
San Francisco, California

Filed July 21, 1993

Before: J. Clifford Wallace, Chief Judge, Dorothy W. Nelson, and Diarmuid F. O'Scannlain, Circuit Judges.

Per Curiam

COUNSEL

Ian Christopherson, Burke & Christopherson, Las Vegas, Nevada, for the plaintiff-appellant.

John W. Field, Jones, Jones, Close & Brown, Chartered, Las Vegas, Nevada, for defendants-appellees I.B. Fischer Nevada, I.B. Fischer Properties, and Ira Fischbein; James R. Olson, Rawlings, Olson & Cannon, Las Vegas, Nevada, for defendant-appellee Foodmaker.

OPINION

PER CURIAM:

Williams appeals from the district court's summary judgment for I.B. Fischer Nevada, I.B. Fischer Properties, Inc., and Ira Fischbein (together Fischer) and Foodmaker, Inc. (Foodmaker). Williams argues that the court erred in rejecting his antitrust claims against Fischer and Foodmaker on the ground that they constitute a common enterprise, incapable of conspiring to restrain trade. The district court exercised jurisdiction under 15 U.S.C. § 15(a) and 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

The facts of this case are described in the district court's published order, *Williams v. I.B. Fischer Nevada*, 794 F.Supp. 1026, 1029 (D. Nev. 1992) (*Fischer Nevada*). We briefly summarize them here. Foodmaker is the franchisor of Jack-in-the-Box restaurants, and Fischer is a franchisee. Foodmaker requires all of its franchisees to consent to a "no-switching" agreement, whereby the franchisees agree not to offer employment to the manager of another Jack-in-the-Box within six months of that manager's termination from employment, unless that manager obtains a release from the franchisee of the Jack-in-the-Box he or she is leaving. Williams managed a Jack-in-the-Box restaurant owned by Fischer and located in Las Vegas, Nevada. Williams wished to relocate to another Jack-in-the-Box, opening in Arizona, but Fischer would not give him the requisite release.

Williams sued Fischer and Foodmaker, alleging that the no-switching agreement violated sections 1 and 2 of the Sherman Antitrust Act (Sherman Act), 15 U.S.C. §§ 1 & 2. In a well-reasoned order, the district court held that Williams's section 1 claims must fail because Foodmaker and Fischer are a common enterprise incapable of conspiring. *Fischer Nevada*, 794 F. Supp. at 1030-33. In rejecting the only one of Williams's section 2 claims that he pursues on appeal, the court held that the no-switching agreement is not anticompetitive and thus cannot violate section 2. *Id.* at 1034.

II

We review the district court's summary judgment independently, and like the district court we must apply the standard prescribed by Federal Rule of Civil Procedure 56(c). *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir.) (en banc), *cert. denied*, 493 U.S. 809 (1989). Under that standard, we will affirm an award of summary judgment if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Williams first challenges the district court's rejection of his Sherman Act section 1 claims. He argued in the district court that the no-switching agreement constitutes an unreasonable restraint of trade and a group boycott, both in violation of section 1. We agree with the reasoning employed by the district court in addressing these claims and with the court's conclusions. *See Fischer Nevada*, 794 F. Supp. at 1030-33.

We made it clear in *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980), that section 1 claims require proof of a conspiracy to restrain trade. To be capable of conspiring, corporate entities must be "sufficiently independent of each other." *Id.* Whether corporate entities are sufficiently independent requires an examination of the particular facts of each case. *Id.* We agree with the district court that, based on the undisputed facts in this case, Fischer and Foodmaker are incapable

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

of conspiring. *Fischer Nevada*, 794 F. Supp. at 1030-31. The evidence cited by the district court, *id.* at 1031, clearly demonstrates that Fischer and Foodmaker comprise a "common enterprise." *See Thomsen v. Western Elec. Co.*, 680 F.2d 1263, 1266-67 (9th Cir.) (*Thomsen*) (similar evidence relied upon to conclude that AT&T, Western Electric, and Pacific Telephone constituted a "common enterprise"), *cert. denied*, 459 U.S. 991 (1982).

The conclusion that Fischer and Foodmaker were incapable of conspiring defeats Williams's argument that the no-switching agreement unreasonably restrains trade in violation of section 1. This conclusion also defeats Williams's argument on appeal that the no-switching agreement constitutes a group boycott "and is thus per se illegal." As the district court explained, only group boycotts engaged in by competitors are per se illegal. *See Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337 n.2 (9th Cir. 1983). Foodmaker and Fischer are not competitors.

Williams's section 2 argument on appeal is brief and opaque. Although difficult to decipher, it is apparent that his section 2 argument, like his section 1 argument, rests on the no-switching agreement. We need go no farther in guessing the argument because "a § 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a § 2 claim." *Thomsen*, 680 F.2d at 1267; *see also Foremost Pro Color Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543 (9th Cir. 1983) (because conduct alleged in support of section 1 claim not anticompetitive, it "is of no assistance" in attempt to state section 2 claim), *cert. denied*, 456 U.S. 1038 (1984). As the no-switching agreement is not anticompetitive and thus does not establish a section 1 claim, it cannot form the basis of a section 2 claim.

AFFIRMED.

CRIMINAL LAW AND PROCEDURE

Defendant's Waiver of Right to Appeal Is Valid Under Plea Agreement Not Breached by Parties

Cite as 93 Daily Journal D.A.R. 9324

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ENRIQUE TORRES,
Defendant-Appellant.

No. 92-50549
D.C. No. CR-92-0185-01-JSR
ORDER AND OPINION

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted May 25, 1993*
San Francisco, California

Memorandum filed June 1, 1993
Order and Opinion Filed July 21, 1993

Before: Procter Hug, Jr., Charles Wiggins, and David R. Thompson, Circuit Judges.

Per Curiam

COUNSEL

Stephanie R. Thornton and Antonio F. Yoon, Law Graduate, Federal Defenders of San Diego, Inc., San Diego, California, for the defendant-appellant.

Roger W. Haines, Jr., Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

ORDER

The memorandum disposition filed June 1, 1993 is redesignated a per curiam opinion.

OPINION

PER CURIAM:

Enrique Torres seeks to appeal his sentence of 33 months, imposed under the United States Sentencing Guidelines ("Guidelines"), following his guilty plea to importing 117 pounds of marijuana into the United States in violation of 21 U.S.C. §§ 952 and 960 and 18 U.S.C. § 2. Torres claims the district court's refusal to depart downward pursuant to *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992), rendered void his waiver of the right to appeal his sentence. Alternatively, he claims he should be allowed to withdraw his guilty plea because the district court committed plain error by participating in the plea negotiations. We have jurisdiction under 28 U.S.C. § 1291 and we affirm the conviction. We decline to exercise jurisdiction to review Torres's sentencing claims and we dismiss them.

A. Facts

Torres was arrested on February 5, 1992, less than a mile north of the Mexico-United States border with 117 pounds of marijuana in the back of his truck. The crime of importation, to which he pleaded guilty, exposed him to a maximum of 20 years imprisonment and a $1 million fine.

The government's initial investigation showed that Torres had a clean record. In fact, he had sustained four prior convictions under different aliases for illegal entry and related offenses.

Torres entered into a plea agreement under which the government promised to recommend a downward adjustment for acceptance of responsibility and a sentence at the low end of the applicable guideline range. The parties also agreed that Torres would argue for a downward departure pursuant to

*The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

FP93-21

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAPPAS TELECASTING, INC. a California corporation, and as Public Trustee,

Plaintiff,

v.

PRIME TICKET NETWORK, a California Limited Partnership, CVN, INC., The PACIFIC-10 CONFERENCE, a California non-profit association, CAPITAL CITIES/ABC, INC., a New York corporation, and DOES 1 through 20, inclusive,

Defendants.

No. CV-F 92-5589-OWW

DECLARATION OF THOMAS C. HANSEN

I, Thomas C. Hansen, declare as follows:

1. I presently am, and since 1983 have been, Commissioner of the Pacific-10 Conference ("Pac-10"). I have personal knowledge of the matters set forth below, except those stated on information and belief, and, if called, could and would testify competently to them.

/ / /

2. The Pac-10 is an unincorporated association comprising the University of Arizona, Arizona State University, the University of California at Berkeley, the University of California at Los Angeles, the University of Oregon, Oregon State University, the University of Southern California, Stanford University, the University of Washington and Washington State University. Under its constitution, "the purpose of the Pacific 10 Conference is to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, to enhance athletic and academic integrity among its members, and to provide leadership in support of its basic values." In furtherance of this purpose, the members of the Pac-10 designate the conference to enter into media contracts for the television of Pac-10 sanctioned intercollegiate athletic events. My duties and responsibilities as Commissioner include participating in negotiating and supervising the administration of those contracts.

3. Among the more widely televised Pac-10 athletic events are men's football games. It is important to the Pac-10's members' football teams to appear on national and regional telecasts for several reasons: (1) to increase the exposure of both the team and the university, which helps the schools recruit quality students, including student-athletes; (2) to earn revenue from the sale of television rights to help finance academic and athletic endeavors; and (3) to increase alumni involvement with the university, financially and otherwise, to the benefit of current students. The Pac-10, along with the Big Ten Conference ("Big Ten"), currently has a contract with American Broadcasting Company for televising Pac-10 and Big Ten regular season home football games. The Pac-10 also has a contract with Prime Ticket Network, Inc. ("PTN"), covering football and some other Pac-10 home

sporting events. In addition, individual members of the Pac-10 frequently contract with television stations or cable television companies in their home areas to telecast football and other athletic events, and contract with visiting institutions to permit television of football and other events in the home areas of those visiting institutions.

4. The Pac-10's goal in entering into the above television contracts is to achieve broad national and regional coverage of the football games played by its member institutions. The Pac-10/Big Ten's contract with ABC covering the 1991 season required ABC to telecast at least 15 live "television exposures" (defined as either a Pac-10 or Big Ten home game telecast nationally or one or more such games telecast regionally to over 50% of the United States television households), consisting of at least 23 Pac-10 or Big Ten home games per season. The Pac-10's contract with Prime Ticket provides for the national cablecasting of an additional 12 Pac-10 home games per year. During the 1991 football season, 25 home games of Pac-10 members (plus 13 Big Ten games) were televised live pursuant to these agreements. This does not include those live telecasts and cablecasts shown pursuant to individual Pac-10 members' agreements with local television stations and cable television companies. According to ratings information we have received, nearly 40 million viewers watched the Pac-10 games televised on ABC alone. The number of college football games, both Pac-10 and otherwise, telecast live during recent years, including 1991, is significantly greater than in years prior to 1984, when the NCAA controlled the television rights for all of major college football.

5. To achieve the above goals, the Pac-10 must compete for television contracts against other sellers of college football, as well as the

providers of other sporting events and other forms of televised entertainment. In particular, the Pac-10 competes for television contracts with the College Football Association ("CFA"), which is comprised of approximately 67 NCAA Division I colleges and universities with major football programs. The CFA currently has a contract with ABC and ESPN for the televising of its members' football games. The Pac-10 also competes for television contracts with the University of Notre Dame which, because of its unique nationwide popularity and fan support, has a contract with NBC for the broadcast of its games.

6. By jointly selling the television rights to their games, Pac-10 members can compete more effectively against the other sellers of college football and other forms of televised entertainment. By offering a package of Pac-10 football games, instead of marketing each school's games individually, the Pac-10 members create a type of product not otherwise available that is more attractive to broadcasters. The national television networks have made it clear that they have no interest in contracting with individual institutions.

7. The Pac-10's contracts with ABC and Prime Ticket contain certain provisions for time period exclusivity. That is, when ABC televises a football game involving a Pac-10 or Big Ten team, no other home games of a Pac-10 or Big Ten team generally may be shown by a broadcasting or cable television company during the 3 1/2 hour time period following the kickoff of that ABC-televised game, except that other such telecasts may overlap the ABC-televised game by up to 45 minutes at the beginning and the end. The Pac-10's agreement with Prime Ticket similarly provides exclusivity during Prime Ticket's cablecasts of Pac-10 home games, but allows third party

telecasts of football games involving Pac-10 teams to overlap Prime Ticket's cablecasts by up to 45 minutes at the beginning and the end. The ABC and Prime Ticket contracts impose no restriction whatever on the televising of Pac-10 member's institutions' away games (so long as those games are with teams outside the Pac-10 or, in the case of ABC, the Big Ten).

8. The Pac-10 found it necessary to agree to such exclusivity provisions to be competitive in the television market. Broadcasters and cablecasters have demanded, and the CFA and other competitors have agreed to provide, such provisions in their contracts. Nonetheless, the Pac-10 insisted that the exclusivity provisions be sufficiently limited to allow the additional television or cable exposures for its members referred to above. Thus, in addition to the games televised by ABC and Prime Ticket, Pac-10 home games can be shown in local markets or beyond on a non-conflicting live or delayed basis. Televising games on a delayed basis is especially common where there is a dedicated local audience for them. Also, it is worth noting that in general Pac-10 institutions have shown no desire to have unlimited television exposure, particularly where the lost ticket revenue and inconvenience to the audience in the stadium exceed the value of the exposure.

9. In early 1990, the FTC began an investigation of competition in the market for college football television rights. In particular, the Commission was interested in the effect on competition of television contracts between broadcasters and the Pac-10/Big Ten and the CFA. A true and correct copy of the subpoena duces tecum and Resolution Directing Use of Compulsory Process in Nonpublic Investigation served on the Pac-10 is attached as Exhibit A. The Pac-10's contracts with ABC and PTN that were in effect at that time were substantively identical to those in effect during the 1991

season. The FTC closed its investigation of the Pac-10/Big Ten, although it filed a complaint against the CFA arising out of its television agreements. (That complaint was dismissed by the administrative law judge on jurisdictional grounds.)

10. I have read the original and amended complaints in this action. I have no direct knowledge of such arrangements as may have been made for televising the FSU-WSU game on September 14, 1991 or the FSU-OSU game on September 21, 1991, although I am informed and believe that the representatives of the two Pac-10 institutions understood that the telecasts of the two games in the Fresno area would be on a delayed basis, and were surprised to hear shortly before the games were scheduled to be played that the television station in Fresno was preparing to present them live.

11. There is nothing in the Pac-10's contracts that would have precluded plaintiff from showing the two games on a delayed basis. Nor would the exclusivity provisions in the Pac-10 contracts referred to above have prevented the games from being telecast live, had the institutions involved wanted that, although the starting time of each game would have had to be changed somewhat. Thus, the FSU-WSU game could have been telecast live commencing at any time up to 12:45 or after 6:15, and the FSU-OSU game could have been telecast live commencing at any time from 3:15 to 4:15. This would have required the start time for the games to have been moved by 1 hour and 15 minutes and 45 minutes, respectively. Of course this would have to have been arranged well in advance of the dates of the games -- not the kind of last minute attempt as evidently occurred here -- and the decision whether to rearrange the starting times would be up to the individual institutions themselves, and could not be dictated by ABC, Prime Ticket, or the Pac-10.